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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1068

FREDERICK B. PFISTER,

Petitioner,

vs.

DELTA AIR LINES, INC., *et al.*,

Respondents,

vs.

THE HONORABLE JUDGE JOSEPH C. WADDY,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

Opinions Below.

1. In the United States District Court for the District of Columbia, the following Orders were duly rendered and entered by Judge Joseph C. Waddy:

A Memorandum and Order dated and filed April 1, 1977, granting the Defendants DELTA AIR LINES, INC., ET AL. Motion for Transfer pursuant to 28 USC Section 1404(a) attached hereto (Appendix 1).

An Order duly rendered and entered by Judge Joseph C. Waddy dated and filed April 28, 1977, denying Petitioner's Motion for Certification under

28 USC Section 1292(b) attached hereto (Appendix 2).

2. Petitioner is unaware that either of the aforementioned decisions has been reported at the present time.

Jurisdiction.

1. The Order of the United States Court of Appeals for the District of Columbia sought to be reviewed is dated and duly filed on October 31, 1977, rendered by Senior Circuit Judge Fahy and Circuit Judges McGowan and Wilkey denying Petitioner's Petition for Writ of Mandamus (Appendix 6), said Order being an Amendment and Revision of a prior Order dated and duly filed on August 2, 1977, by Senior Circuit Judge Fahy and Circuit Judge McGowan only (Appendix 3).

2. An additional Order of the United States Court of Appeals for the District of Columbia also sought to be reviewed is dated September 20, 1977 and was duly filed at that date, rendered by Circuit Judge Wright and MacKinnon Dismissing Appellant/Petitioner's Appeal (Appendix 9).

3. Petitioner's Petition for Rehearing, *En Banc,* was denied by Order of United States Court of Appeals, dated and filed September 13, 1977 (Appendix 4).

4. Petitioner's Motion for Stay of Mandate Pending Petition for Certiorari was granted by Order of the Court for a time until further Order of the Court, dated and filed October 7, 1977 (Appendix 5).

5. Petitioner's Motion for Further Stay and Retention of Mandate Pending Application for Petition of Certiorari in the Supreme Court was granted by Senior

Circuit Judge Fahy and Circuit Judges McGowan and Wilkey on November 11, 1977 and stayed the Mandate until December 15, 1977 (Appendix 14).

6. Order granting Petitioner's Motion for Clarification of Mandate and Order dated and filed December 29, 1977, and providing clarification (Appendix 7).

7. Petitioner's Motion for Further Stay and Retention of the Mandate upon application for Petition of Certiorari in the United States Supreme Court if need be and Pending Clarification of the Mandate was granted by Order dated and filed January 16, 1978, to and including January 30, 1978 (Appendix 8).

8. Order granting Appellant/Petitioner's Motion to Stay or Recall and Retain Mandate pending application of Petition for Certiorari in the United States Supreme Court, dated and filed September 27, 1977 for a period of thirty (30) days (Appendix 10).

9. Order granting Appellant's Motion for further Stay and Retention of Mandate Pending application for Certiorari in the United States Supreme Court to and including December 15, 1977, dated and filed November 2, 1977 (Appendix 11).

10. Order granting Appellant's Motion for Further Stay and Retention of Mandate Pending Clarification of Mandate and application for Certiorari in the United States Supreme Court, if need be, until January 30, 1978. No further stays of this Court's Mandate to be granted by this Court (Appendix 12).

11. Order dated and filed January 10, 1978 by Circuit Judges Wright and MacKinnon denying Appellant's Motion for Leave to Consolidate Causes (Appendix 13).

12. Jurisdiction of the United States Supreme Court to Review the Order of the United States Court of Appeals as set out above is conferred by 28 USC Section 1254 which provides "cases in the Court of Appeals may be reviewed by the Supreme Court by the following methods: (1) by Writ of Certiorari granted upon the Petition of any party to any civil or criminal case before or after rendition of judgment or decree." . . .

13. Further, the Petitioner asserts Jurisdiction on the basis that the lower court and the U.S. Court of Appeals has functionally decided an important question of Federal Law which has, as yet, not been addressed by this Court, but because of its importance should be settled by this Court; and that the Court of Appeals has decided a Federal question respecting appealability of the venue provisions of the ERISA Statute in a way conflicting with other applicable decisions of this Court; and finally, that the United States Court of Appeals has endorsed judicial aberrations by the Lower Court such as to seriously undermine the purposes of a new and important Federal statute strongly equitable in nature requiring an exercise of this Court's supervisory powers.

14. Petitioner is also relying upon Rule 23[5] of the Rules of the Supreme Court in filing this his single petition for Writ of Certiorari covering both cases below.

Questions Presented.

1. GENERAL QUESTION: Did Congress intend to ascribe the Venue Provisions of 29 USC 1132(e) a higher legislative significance than 28 USC Section 1404(a) in view of the remedial and equitable nature of the Statute; the liberal and broad venue design; the fiduciary relationship between the litigants; and the natural infirmities of the ERISA plaintiff who by definition is either elderly seeking retirement benefits or disabled seeking welfare benefits?

The Courts below answered "No".

2. SPECIFIC QUESTION: Did Congress intend a Plan Beneficiary who by definition is either old or disabled to bear the enormous hardship and burden—economic, physical, emotional and otherwise—of having to travel to a forum dominated by Defendants and totally inconvenient and distant from the forum in which he is forced to reside to assert and enforce his rights respecting property being held by the Defendants as fiduciaries for his exclusive benefit and in his sole interest which is properly his.

The Courts below answered "Yes".

3. SPECIFIC QUESTION: Did the Congress intend a Plan Beneficiary who by definition is either old or disabled and who has a statutory right under 29 USC 1132(e) to initiate his Action in Washington, D.C., e.g. where the breach took place, where the Defendant resides and may be found, to have his choice vitiated by Defendants who stand in the relationship of fiduciaries to him and have voluntarily assumed said status and responsibility and receive consideration in the form of tax-exemption from the Federal Government under IRC 501(c)(9).

The Courts below answered "Yes".

4. GENERAL QUESTION: Was the Appellant/Petitioner entitled to an immediate appeal of the Order granting the Defendants' Motion to Transfer and the subsequent refusal of the Lower Court to certify under 28 USC 1292(b) through the Collateral Order Doctrine first promulgated by the Court in COHEN V. BENEFICIAL INDUSTRIAL LOAN CORP.?

The Court below answered "No".

5. SPECIFIC QUESTION: Does 28 USC Section 1291 which vests the United States Court of Appeals with jurisdiction of Appeals from all final decisions of the District courts of the United States authorize the U.S. Court of Appeals for the District of Columbia to take jurisdiction of the lower court's Order granting Defendants' Motion for Transfer under 28 USC 1404(a) and rescinding Appellant's venue choice which was otherwise proper under the Statute, 29 USC 1132(e) and to certify the question under 28 USC 1292(b)?

The Courts below answered "No" and dismissed Appellant/Petitioner's Appeal.

Statutory Authorities.

1. Provisions of the Employee Retirement Income Security Act of 1974 (ERISA).

29 USC Section 1001 . . .

"(b) It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." . . . (The entire text of the provision is more fully set forth in Appendix 15).

29 USC Section 1002—Appendix No. 16;

29 USC Section 1104—Appendix No. 17;

29 USC Section 1132(e)(1)(2)&(f)(h)(k)—Appendix No. 18;

29 USC Section 1140—Appendix No. 19.

29 USC Section 1024(a):

"*The Secretary shall make copies of such plan descriptions, summary plan descriptions, and annaul reports available for inspection in the public document room of the Department of Labor.* The administrator shall also furnish to the Secretary, upon request, any documents relating to the employee benefit plan, including but not limited to the bargaining agreement, trust agreement, contract, or other instrument under which the plan is established or operated". (emphasis added).

29 USC Section 1024(b)(1)(2)(3)(4)—Appendix No. 20.

29 USC Section 1031(a)(1):

"The Welfare and Pension Plans Disclosure Act is repealed except that such Act shall continue to apply to any conduct and events which occurred before the effective date of this part."

28 USC 1404(a):

"for the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

28 USC Section 1291—Final Decisions of District Courts:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . ."

28 USC Section 1292(b):

> "When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, that application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order."

Statement of the Case.

A. Foundation Facts.

In October 1976 Petitioner commenced suit against Delta Air Lines, Inc., the Delta Family Care Plan, a voluntarily self-blueprinted, self-insured, and internally self-administered (Delta senior executives), Employee Benefit Plan (Welfare and Pension Benefits) enjoying a tax-free status under the Internal Revenue Code Section 501(c)(9); and various named corporate executives, senior employees and/or agents of Delta Air

Lines, Inc. as fiduciaries of said Plans. All named defendants are indispensable parties because of their fiduciary status under the Plan and accordingly were joined in suit.

Petitioner brought suit—Civil Action No. 76-1978—in the United States District Court for the District of Columbia pursuant to his venue options under the Act, 29 USC 1132(e), to enforce and assert his rights under the Delta Family Care Welfare and Pension Plan. In addition to the recovery of benefits owing to him, the Petitioner is also seeking compensatory and punitive damages and has asserted a host of violations of the fiduciary provisions of the Employee Retirement Income Security Act of 1974 (ERISA), 29 USC Section 1104, and for numerous violations of other of his rights including the negligent and intentional infliction of emotional harm and distress; breach of the implied duty to deal in good faith; fraud, misrepresentation and deceit at common law; and for various penalties accruing to him on account of the Defendants' violation of the disclosure provisions under ERISA and its predecessor Act.

Delta Air Lines, Inc., the corporate defendant, derives lucrative tax advantages from their self-funding and self-administration of the Delta Family Care Plan; and in 1975 Calendar Year Ending, paid no Federal Income Taxes on a total Adjusted Net Income of $73,679,000. (*Congressional Record,* Vol. 122, October 1, 1976).

From approximately April 1973 through June 1974, Petitioner in the course of discharging his duties as a heavy-duty airline maintenance mechanic for Delta Air Lines, Inc. with a near-perfect 15-year uninterrupted

service record sustained three very serious orthopedic injuries at Washington National Airport, Washington, D.C.

The Petitioner was certified totally disabled from performing any occupation in November 1974 by one of his treating Workmen's Compensation physicians on account of said injuries and has not worked in any capacity since June 1974 nor received any wages of any kind through the present date. He is now financially, physically and emotionally ravaged. In August 1975 after extensive steriod drug treatment including Butazolidan, Percodan, Indocin, as well as many others, the Petitioner had emergency surgery performed for a perforated bowel, with an intra-abdominal abscess and a general poisoning of his entire system and nearly died.

The Petitioner is now permanently and totally disabled, cannot work, has little if any funds, has serious physical and emotional problems and forced to reside with his Mother who cares for him in Nicktown, Pennsylvania.

The Petitioner received coverage under the Delta Family Care Short-Term Disability Provision through January 1975. Thereafter Petitioner was certified by the Plan and did in fact receive Long-Term Disability Benefits from the Plan commencing on January 16, 1975.

On March 5, 1975, his condition no better than on January 16, 1975, Petitioner received a letter on Delta Air Lines, Inc. stationery signed by William E. Stephens, a named fiduciary Defendant, advising him that effective March 1, 1975, his Long-Term Disability Benefits were terminated and that also effective

March 1, 1975 "you have no further coverages under the Delta Family Care Plan—medical, dental, life insurance, survivors or disability benefits". Said termination occurred without prior warning or notice and no explanation nor reasons were given to the Petitioner for this action. Further, Petitioner was not afforded any pre- or post-deprivation hearing, nor was he advised of any administrative grievance procedures that could be instituted on his behalf. 29 USC 1133 (Appendix 21).

Commencing on or about March 13, 1975, Petitioner initiated efforts to secure necessary Plan Documents, texts, procedures and the like which would identify his rights respecting said termination of benefits. No documents were furnished Petitioner and no hearing or explanation was provided to him concerning his cancellation of coverages under the Delta Family Care Plan. 29 USC 1024(b)(1)(2)(3)(4) (Appendix 20).

The Petitioner conducted a search of the records of the United States Department of Labor in Washington, D.C., the custodian of all Plan documents to secure the necessary Plan Texts and Procedures necessary for asserting his rights, said disclosure mandated under both ERISA, 29 USC Section 1024(a), and the Welfare Pension Plan Disclosure Act, 29 USC Section 301, *et seq.* made binding on the defendants by 29 USC Section 1031(a)(1)—See statutory authority. The Dept. of Labor noted in August 1973 in an internal communication that the Plan Text was missing and not on file as required by law. On March 8, 1976 the Dept. of Labor through its duly authorized officials noted that the Plan Text Document containing procedures for instituting a grievance was still missing.

On Sept. 13, 1976, the Dept.'s files were reviewed and showed that a Notice of Violation had been cited upon the Defendant Delta Air Lines and that compliance had been allegedly achieved on March 12, 1976. However, the Enforcement Division could not and did not produce or provide the missing Document which was the subject of the violation. This was verified by an authorized letter from the Dept. of Labor on Sept. 15, 1976. The missing document was ultimateiy procured by the Department from the Defendant Delta Air Lines on September 27, 1976. Delta Air Lines, Inc. forwarded a copy of the information requested by the Petitioner which he first requested on or about March 13, 1975 to him on or about Dec. 14, 1976 after he filed suit more than a year and a half after the initial request for same.

Shortly after Petitioner commenced the within Suit and prior to any opportunity for discovery, Defendant Delta Air Lines, Inc., *et al.* filed a Motion to transfer the Case to the Nothern District of Georgia, Atlanta Division, pursuant to 28 USC Section 1404 "for the convenience of the parties and witnesses in the interest of justice". (Appendix 1). Defendants' Motion was granted by Judge Joseph C. Waddy. Petitioner filed a Motion that the Order granting Defendants' Transfer be certified for immediate appeal pursuant to 28 USC Section 1292(b) and Petitioner's Motion was denied (Appendix 2).

B. The Mandamus.

Petitioner filed an amended Petition seeking issuance of the Writs of Mandamus or Prohibition, or both, in the United States Court of Appeals for the District of Columbia on June 22, 1977. The Petition was

denied by Senior Circuit Judge Fahy and Circuit Judge McGowan on August 2, 1977. (Appendix 3).

On October 31, 1977, after the Petitioner successfully stayed the Mandate of the Court of Appeals (Appendix 5), Senior Circuit Judge Fahy revised the earlier Mandate of the Court to reflect his view "that transfer of this Case to the Northern District of Georgia, Atlanta Division, would seriously endanger the ability of the Plaintiff to carry forward there the litigation he has chosen to initiate in this jurisdiction. . ." Further, Judge Fahy was of the persuasion that the inconvenience the Defendants would bear in defending here, *i.e.*, Washington, D.C. does not appear to be of similar seriousness (Appendix 6).

Further Stays of the Mandate were granted by the aforementioned Court consisting of Senior Circuit Judge Fahy and Circuit Judges McGowan and Wilkey to and including December 15, 1977 (Appendix 14), and to and including January 30, 1978 (Appendix 8).

On December 29, 1977, an Order clarifying the Mandate of October 31, 1977, was entered and the Mandate was clarified (Appendix 7).

C. The Appeal.

Petitioner filed his Notice of Appeal taken from Lower Court Judge Joseph C. Waddy's refusal to certify his appeal from the Order granting Defendants' Motion for Transfer from Washington, D.C., a venue choice made available to the Petitioner under 29 USC 1132(e) to the Northern District of Georgia, an area where the Defendants' presence is pervasive, if not dominant.

Defendants/Appellees, and each of them, moved to Dismiss the Appellant's Appeal on the basis that

the Order he sought to appeal from was neither final nor appealable as contemplated by 28 USC Section 1291 nor 28 USC Section 1292(b). Defendants/Appellees' Motion was granted by Order rendered from Circuit Judges Wright and MacKinnon (Appendix 9). Said Order was duly filed on September 20, 1977.

Petitioner/Appellant's Motion to Stay or Recall and Retain the Mandate Pending application of Petition for Certiorari was granted by Order of Circuit Judges Wright and MacKinnon on December 27, 1977 for a thirty-day period (Appendix 10).

A further Stay and Retention of the Mandate was ordered by Circuit Judges Wright and MacKinnon to and including the 15th day of December 1977 (Appendix 11).

In its Order filed January 4, 1978, Circuit Judges Wright and MacKinnon upon consideration of Appellant's Motion for a further Stay and Retention of the Mandate Pending Clarification of the Mandate of October 31, 1977, and application for Petition of Certiorari in the United States Supreme Court, if need be, granted its final stay to and including January 30, 1978 (Appendix 12).

D. Current Status of the Case.

As matters currently stand, the Petitioner/Appellant has been informed by both the U.S. District Court Judge and the U.S. Court of Appeals that the right Congress gave him to bring his Action in Washington, D.C. which clearly exists is not as great as the Defendants' right to transfer and defend this lawsuit in Atlanta, Georgia. With the exception of Senior Circuit Judge Fahy of the U.S. Court of Appeals for the District

of Columbia in his Revised Opinion of October 31, 1977, no court has attached any significance to the Petitioner's statutory right to have his case heard in Washington, D.C., and to otherwise recover benefits and assert rights which the Statute ERISA confers upon him and to enforce the fiduciary obligations the Statute imposes upon the Defendants who are handling property that belongs rightfully to him, the Petitioner, and for which the Defendants are receiving tax shelter. In 1975, Defendant Delta paid no corporate income taxes on $73 million of total adjusted net income.

In addition to being told by the U.S. Court of Appeals that Judge Waddy's Order of Transfer was legal (Appendix 3 and Appendix 6), the U.S. Court of Appeals also has advised Petitioner that he has no immediate right to challenge this ruling, but must wait until after a trial is conducted in Atlanta, Georgia, after he exposes himself to further risk of irreversible physical, emotional and financial detriment to assert his right to appeal the venue question. This is not a dilemma ERISA intended to place upon the Plan beneficiaries who look to this Statute for its protections and to guarantee their benefits and security for the future.

The Petitioner is further confused because the U.S. Office of Workmen's Compensation programs charged with the responsibility of interpreting coverage and applicability of the District of Columbia Workmen's Compensation statute has taken the position that the Petitioner's claim for compensation benefits is clearly within the scope and the protection of the District of Columbia Workmen's Compensation Statute.

ARGUMENT.

Certiorari should be granted in this case because of the following reasons:

1. The Case Presents Crucial Federal Questions of First Impression Under the Employee Retirement Income Security Act of 1974 (ERISA) Which This Court Must Address and Resolve.

The very cornerstone of the ERISA Statute is the creation of a Federal fiduciary standard of care which is to govern the rights and obligations of all the participants involved in the private pension sector. The Employee Retirement Income Security Act of 1974 represents the most comprehensive legislative attempt to regulate "private" benefit plans and to otherwise guarantee the American Worker of his employee benefits and pension rights.

The entire legislative history of the Employee Retirement Income Security Act of 1974 exudes a strong preference raising all presumptions in favor of the Plan Beneficiary. That the ERISA Statute is in its most formative period of growth is apparent. The obstacles that are facing this growing and emerging Statute of unprecedented social change have been aptly summarized in the text of the Activity Report of the Committee on Education and Labor of the U.S. House of Representatives p. 40 and seem to have particular relevance to the Case at bar . . .

> "private party and Department of Labor initiated litigation will shortly add a new and potentially dangerous dimension to the problem. At the moment, the adverse effects are localized in the administrative activities of the agencies. As the

federal court system becomes active in private litigation under Title I, the conflicts will almost certainly become more and more troublesome. These cases will be resolved within the context of Title I under its equity-oriented principles of law. Assuming, as we do, that substantial variations from the Internal Revenue Service's interpretation of the Title II standards will be adopted by the courts, the results may be chaotic.

Our concern is founded on our conviction that the courts charged with adjudicating actions undertaken by private parties will view ERISA (especially Title I) as having created a series of obligations owed by Plans and Plan Fiduciaries to the Plan Participants and Beneficiaries. *It is likely that these courts hearing cases in which aggrieved Participants are attempting to assert rights established under Title I will construe the ERISA duties and standards liberally in favor of those Plaintiff-Participants who are the beneficiaries of the protective provisions of the Act. The nature of the rights created and the causes of action that will arise as Plan Participants seek to vindicate those rights require that courts use both the Statute and the remedies for breaches with the creativity and flexibility that is inherent in any equity-oriented action.*" (Emphasis added).

Applying this legislative purpose enunciated by the ERISA Oversight Task Force in January 1977 to the facts of the instant Case raises serious questions as to the awareness and propriety of both the U.S. District Court for the District of Columbia and the U.S. Court of Appeals for the District of Columbia's conduct and decision making with respect to a determination of

the Petitioner's rights that are conferred upon him by the ERISA Statute, 29 USC 1132(e) to have his lawsuit heard and tried in the forum of his choice. The decision of both the U.S. District Court and the U.S. Court of Appeals simply do not "wash" in the context of the expressions which motivated and continue to motivate the ERISA Statute.

Daresay, the Petitioner is confounded by a Statute which expressly mandates that the duties and standards be liberally construed in favor of Participants and Beneficiaries such as the Petitioner when he has been told that in order for him to enjoy the protective provisions of the Act he would have to expose himself to substantial risk of physical, financial, and psychological hardship irrevocable in its impact, devastating in its scope, by travelling 1500 miles distant from where he resides.

To further compound the wrong, the Petitioner has been told that he has no right to challenge the ruling which the lower court made respecting the transfer to Atlanta, Georgia at the present time, but rather he must go through with an expensive and injurious trial first so that he might raise his challenge to venue later. Is this the equity-oriented action mandated in the Statute forged by the Congress? Is this the liberal construction that the Congress has read into the Statute favoring Beneficiaries such as the Petitioner?

I don't believe this Honorable Court should or will stand for such an incongruent decision that totally overcomes the meaning of ERISA and discredits the

United States Congress who worked hard to effectuate legislation to serve the interest of close to thirty million American working people.

The Honorable Judge William H. Webster, soon-to-be FBI Director, made very provocative comments during a panel discussion on the fiduciary responsibilities engendered by ERISA 131 *The Business Lawyer,* 130 (October 1975). He stated:

> "pension plans and welfare plans are favored in the law. They enjoy favorable tax treatment. . . .
>
> There are far too many plans in this country, thousands of them I suppose that are being operated by people who simply do not know how properly to provide for future retirement earnings for employees at a proper level of risk . . . many of these companies are owned or controlled by small groups of interests who regard the funds that are placed in these funds as "*their funds and their money. In fact, in many cases, the funds were placed there as tax shelters and not with some benevolent idea of helping employees along.*" (emphasis added).

The principle to be extracted and applied to the instant case is that the money and the benefits the Petitioner is seeking to recover are not the Defendants', but are being held in trust for him, the Participant. All semblance of rationality is lost when the lower courts tell the Participant he must travel over 1,500 miles to establish his rights to property being held for his exclusive best interest by Defendants who have

been generating tax shelters on those monies of substantial magnitude for at least five (5) years. That this violates even the most humble interpretation of judicial fairness is an understatement.

The legislative history of the Employee Retirement Income Security Act of 1974, published in April 1976, at page 1174, indicates:

> "liberal venue and service provisions are established for actions brought in the Federal District Court."

In point of fact, the United States Congress in its findings and declaration of policy, its preamble to the ERISA Statute, indicates it is the avowed intention of the Act to protect the interests of Participants in Employee Benefit Plans by providing for appropriate remedies, sanctions and *ready* access to the Federal courts.

It is clear that all of these guideposts that have been listed have clearly been ignored in reaching the decision which now lingers over the Participant seeking to deny him those guarantees that Congress has legislatively ordained for him.

Senator Edward Kennedy succinctly summarized the awesome responsibilities that the Congress and now this Honorable Court have in effectuating the purposes of this Statute. In Volume 119 of the *Congressional Record*, Part 23, at Page 30411, the Senator had this to say:

"The witnesses testifying before the Senate Labor Committee and before the Senate Finance Committee brought unending tales of tragedy. For most of them, the time had already passed when their grievance could be redressed. But for millions of other Americans,

what we do this afternoon in passing this legislation may mean the difference between living in dignity and living in poverty."

The Petitioner is entitled to live in dignity and to have his rights asserted in the tribunal of his choice in Washington, D.C. and should not be forced to bear the burden that Congress never intended to place upon him to assert his rights.

2. The Case Affects Millions of Pension and Welfare Benefit Plan Beneficiaries and the American Worker and Taxpayers.

The ERISA Statute is one whose parameters are still being defined and whose identity is still being shaped. There is a strong and pervasive need for the Supreme Court to assume the initiative in resolving many of the interpretative questions that if unresolved will cloud the expectation of prospective beneficiaries, contribute to confusion on the part of Plan Administrators, Trustees and Sponsors, and otherwise frustrate fulfilling beneficiaries' expectations.

The venue provisions in the Statute are clear. It is also clear that they are to be interpreted liberally and broadly in favor of the Beneficiary. It is the position of the Petitioner that there is something resembling a statutory presumption operating in the Plan Beneficiary's favor that allows him to press his cause of action in any of the venues that are circumscribed by 29 USC 1132(e). It is incumbent upon the Court now to clarify and better identify the character of the statutory right available to the Petitioner, as it is a right of paramount significance, albeit procedural, without which a Plan Beneficiary cannot unlock any

of the doors which guard the substantive rights in the Statute. Clarification is needed on this point, on an urgent basis, as it is impractical to subject a Plan Beneficiary who is either old or disabled to the arduous vagaries of the litigation that can be protracted indefinitely by irresponsible Plan Sponsors, Administrators or the like.

3. The Case Demonstrates Obstruction of Congressional Intent Respecting Employee Retirement and Welfare Benefit Protections by the Lower Court and the U.S. Court of Appeals.

In the instant case at bar, both the U.S. District Court and the U.S. Court of Appeals have acted in a manner which is totally out of phase with the substantive purposes and protections created by Congress under the ERISA Statute.

It is imperative that the Supreme Court of the United States curb and otherwise cure this impermissible and irresponsible legislative interpretation by the courts. If the Supreme Court, too, defaults on its responsibility and congressional mandate to view the Statute with the "creativity and flexibility implicit in equity-oriented legislation," the Act will be run by the same self-interested motives that gave rise to its need in the first place.

The Plan Benefits conferred upon the Petitioner by virtue of 29 USC 1104 (Appendix 17) require the Defendants operate and discharge their fiduciary duties with respect to the Plan solely in the interest of the

Petitioner and for the exclusive purpose of providing benefits to the Participant. This requirement must be carefully applied to the within case and raises further questions as to the integrity of the lower court's ruling with respect to the denial of the Petitioner's Mandamus Petition and the Dismissal of his Appeal.

Both the U.S. District Court and the U.S. Court of Appeals in the instant case failed to properly evaluate the superior capability that the Defendants have with respect to transporting witnesses and otherwise conducting a lawsuit in Washington, D.C. Nowhere does either court give consideration to the fact that the Defendants are an airline and therefore can have maximum access to Washington, D.C. Area which they serve regularly with a minimum amount of inconvenience and a maximum amount of ease. It is obvious that the Petitioner has no comparable capability whatsoever.

The Court in *Hohler v. Pennsylvania Railroad Company*, 140 F.Supp. 487 (1956) expanded the importance of this concept as it related to a railroad when it stated:

> "Several courts have observed that the problem with transporting witnesses does not present the same difficulties to the Defendant railroad as it would to a private person."

This principle is extremely applicable to the Petitioner's cause and was inadequately considered in arriving at a determination of the transfer order against him.

4. The Case Presents Collateral Appellate Decisions in Sharp Conflict With the Decisions of the Supreme Court.

The decision by the U.S. Court of Appeals (Appendix 9) to dismiss the Appellant/Petitioner's Appeal flies squarely in the face of a hierarchy of Supreme Court decisions commencing with *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1948) and extending through *Gillespie v. U.S. Steel Corp.*, 379 U.S. 148 (1964) and *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1974) which would treat the decision granting the Defendants' Motion to Transfer under 28 USC 1404(a) as falling

> "in that small class which finally determine claims of right separable from and collateral to rights asserted in the action too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. The Court has long given this provision of the Statute this practical rather than a technical construction." (*Cohen v. Beneficial*, 337 U.S. 541, 546).

The policies and purposes behind 28 USC Section 1291 is to ensure finality and to avoid the inconvenience and cost of piecemeal review if decisions aren't final. However, in the instant case, the practical effect of denying the Petitioner an immediate right of appeal with respect to the venue order entered by Judge Joseph C. Waddy (Appendix 1) is that the probability of inconvenience, protracted litigation, unnecessary expense and delay is greater because the Petitioner would be forced to assert these rights regarding venue at the conclusion of a trial on the merits. Accordingly,

if after a decision on the merits the Court were to find that the venue order was erroneous, then each of the litigants would be faced with having to relitigate the matter in a forum which was proper.

As the Court noted in *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, and *Brown Shoe Company v. United States*, 370 U.S. 294 (1962), the question of finality involves competing considerations between "the inconvenience and cost of piecemeal review on the one hand, and the danger of denying justice on the other."

Further, the Petitioner's Case comes tightly within the rationale of the GILLESPIE Rule which held that the inconvenience and costs of trying this case do not appear to be greater because the Court of Appeals decided the issues raised instead of compelling the parties to go to trial with them unanswered. The Court in that case stated:

> "and it seems clear now that the case is before us, that the eventual costs as all the parties recognize will certainly be less if we now pass on the questions presented here, rather than send the case back with these issues undecided . . . delay of perhaps a number of years in having the brothers and sisters rights determined might work a great injustice on them . . ."

The reasons for applying the Collateral Source Rule to the within proceeding seem to be extremely sensible and relevant in the case at bar. There does not appear to be any rational basis for the Court of Appeals to deny or dismiss the Petitioner's Appeal, thereby leaving him with no mechanism to challenge the venue order entered and otherwise completely and irrevocably

depriving him of the venue right conferred by 28 USC 1132(e). That venue right can never be reconstituted! The Court of Appeals has functionally deprived the Petitioner of that right and the only judicial body that can provide it to him is this Honorable Court. The Petitioner should be afforded an immediate right of appeal, and this should be carried out forthwith, as a venue challenge after trial is senseless.

Summary and Conclusion.

The questions involved and presented in this Petition shake the very foundations of the ERISA Statute. They focus for the most part upon procedural rights that are clearly congressionally ordained. For whatever reason, the Petitioner, a totally and permanently disabled beneficiary, has had his statutory rights rescinded by a U.S. District Judge, a decision concurred in by various members of the U.S. Court of Appeals for the District of Columbia; and furthermore, has been told by that same U.S. Court of Appeals that he has no immediate right of appeal to see if he can retrieve his statutory right under 29 USC 1132(e). The harm to his statutory rights is irrevocable as irreparable; and yet, almost a year later the Petitioner has filed this, his Petition for Certiorari, to have the highest Court in the Land, the final judicial mechanism, to intervene on his behalf to effectuate the policies and protections of what has been marketed as the most equitable and beneficiary-oriented law to be passed in the last half century.

The fact that the Petitioner has nowhere else to go with his grievance other than to This Honorable Court is prima facie evidence of the strong need for This Court to act forthwith in providing judicial guidance that will effectuate the purposes of the Act

and to exercise more forceful judicial supervision over its lower courts with whom Congress has invested its mandate of fulfilling the ERISA Statute.

This Court should be ever mindful of those words spoken earlier by Senator Kennedy, paraphrasing them ". . . that for millions of other Americans what *you*, The Supreme Court, do may mean the difference between the Participant and millions of workers like him to live in dignity, or to live in poverty."

Respectfully submitted,

EUGENE J. CARELLA,
Counsel for Petitioner.

Dated: Jan. 27, 1978.

APPENDIX

APPENDIX 1.

Memorandum and Order.

In the United States District Court, for the District of Columbia.

Frederick B. Pfister, Plaintiff, v. Delta Air Lines, Inc., et al., Defendants. Civil Action No. 76-1978.

Filed: April 1, 1977.

Plaintiff herein, Frederick B. Pfister, a former employee of Delta Air Lines Inc. (Delta), alleges violations of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.* (ERISA). Defendants are: Delta; the Delta Employee Benefit Plan (the Plan), consisting of Delta Family Care, Disability and Survivorship Plan, Delta Air Lines, Inc. Group Insurance Plan, and Delta Family-Care Retirement Plan; the Delta Administrative Committee acting on behalf of Delta Family Care, Disability and Survivorship Plan, and Delta Family-Care Retirement Plan; Delta Administrative Committee members W. T. Beebe, D. C. Garrett, Jr., R. Oppenlander, J. R. Howell, H. T. Fincher, R. W. Allen, R. S. Maurer, T. M. Miller, Wm. E. Stephens, each in their individual capacities; the Plan Administrator of Delta Family Care, Disability and Survivorship Plan, Delta Family-Care Retirement Plan, and Delta Employee Benefit Plan, individually; John Aduddell; J. J. Schneider; And Donald Baus (all of the above hereinafter collectively referred to as Delta Defendants); Charles T. Bishop, Jr. (Bishop); and the Brewer Adjustment Company (Brewer).

Briefly stated, plaintiff alleges that in 1973, while employed as a mechanic by Delta at its facilities at Washington National Airport in the State of Virginia, he suffered a back injury. On March 30, 1974, he re-injured his back, and apparently also suffered additional injuries, but continued working through June 30, 1974. Plaintiff alleges that during this period of time, Delta, acting in concert with the Plan and other defendants, tried to force him to quit his job and thereby forfeit all employee benefits. Plaintiff further alleges that although certain Delta representatives told him he would be assigned "light work", he was required to perform work involving heavy lifting, resulting in his total disability from June 30, 1974 to present. He was certified as totally disabled by his attending physician on November 8, 1974. On March 1, 1975, following an interview with defendant Bishop (who is employed by defendant Brewer) during which plaintiff allegedly made a statement damaging to his disability claim, Delta rescinded his permanent disability status. On that same date, all other employee benefits were cancelled by Delta and the Plan.

Plaintiff's attempts to obtain copies of the benefit plans were apparently unsuccessful until September 27, 1975, when copies were secured from the Department of Labor. Plaintiff seeks, *inter alia*, disability medical and retirement benefits, cumulative damages and penalties in excess of $48,000,000, and a permanent injunction against the defendants. Jurisdiction is based on Sections 1132(e) and (f) of ERISA, 29 U.S.C. § 1132(e) and (f), which broadly vest jurisdiction in the district courts of the United States.

At issue are the following motions: (1) Delta defendants' Motion for Change of Venue and Requests for

Attorneys' Fees and Costs and for Oral Hearing on the Motion;[1] (2) Delta defendants' Motion to Strike and/or Dismiss, Requests for Costs and Attorneys' Fees and Request for an Oral Hearing; and (3) the Motion of Defendants Brewer and Bishop to Dismiss or in the Alternative for Change of Venue. At a preliminary matters' hearing on March 18, 1977, the Court granted defendants' request to limit the hearing scheduled for March 21, 1977, to the pending motions for a venue change (and the related Requests of Delta defendants and plaintiff for Costs and Attorneys' Fees), thus leaving the pending motions to dismiss, *etc.*, for subsequent determination either by this Court should the change of venue motions be denied, or by the proposed transferee Court should said motions be granted.

Defendants seek a transfer of this case to the Northern District of Georgia, Atlanta Division, pursuant to 28 U.S.C. § 1404(a) "for the convenience of parties and witnesses, in the interest of justice". In this regard it is well established that plaintiff's choice of venue is to be given preference, and that the burden of showing that this action should be transferred to the Northern District of Georgia, Atlanta Division, is on the defendants. *See, e.g., Briggs v. Goodwin,* 384 F. Supp. 1228, 1230 (D.D.C. 1974).

In support of their motions for a venue change, defendants[2] point out that plaintiff, now unemployed, resides in Nickton, Pennsylvania, and has not at any

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[1]In his opposition to Delta defendants' motion, plaintiff has likewise requested an oral hearing, costs and attorneys' fees on this motion.

[2]Defendants Brewer and Bishop have substantially adopted each of the arguments advanced by Delta defendants.

relevant time either lived or worked, except on occasional assignments, in the District of Columbia. On the other hand, all but three (3) of the individual defendants in the case live and work in Atlanta.[3] Moreover, the record shows that most of these individual defendants are senior corporate officers of Delta whose absence could have serious adverse effects on Delta's operations. Defendant Brewer is a small claims adjustment business operated by Mr. Joe Brewer in Atlanta. It is asserted that should both Mr. Brewer and his assistant manager, defendant Bishop, be required to leave Atlanta for the trial, severe inconvenience, as well as financial and personal hardship, would result.

Defendants further contend that the relevant business records are in Atlanta where Delta's corporate headquarters and principal place of business, and Brewer's business offices are located. The vast majority of the critical defense witnesses, which defendants identify as being most of the named defendants, including those who allegedly made certain representations to plaintiff, along with the individuals involved in processing his claim, live and work in the Atlanta area. Finally, Delta defendants provide statistics comparing court congestion here and in the proposed transferee court in support of their argument that a final determination of the case will be obtained more quickly both in the Northern District of Georgia, Atlanta Division, and in the Fifth Circuit, should an appeal be taken.

In opposition to the Motions for Change of Venue, plaintiff asserts that his physical (and mental) condition dictates retention of the case in this forum, and

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[3]All Delta defendants, however, have joined in the Motion for Change of Venue.

that he would be unable physically to endure the lengthy trip from his home in Pennsylvania to Atlanta. The characterization of his condition is "totally incapacitated". Plaintiff further contends that his witnesses, his treating physicians, are located in the District of Columbia and in Northern Virginia,[4] that he cannot afford additional travel expenses, particularly since accommodations would be provided without cost to him here,[5] and that he is without funds to retain additional counsel. Finally, suggestions have been made that this case raises complex ERISA questions which should be resolved by this Court because of its proximity to the Federal Government, more specifically the Department of Labor which is the repository for claims under ERISA.

In balancing the various interests herein, it is clear that the balance weighs heavily in favor of defendants. The vast majority of the parties, witnesses, and documentary evidence are located in Atlanta. And while the Court is sympathetic to plaintiff's physical and mental condition, the record also reflects that no less than three of the defendants, Joe Brewer, William Stephens and William Beebe, also have serious medical conditions which must be taken into consideration. Moreover, if the plaintiff is as emotionally and physically permanently injured as it is alleged, the Court must assume that he would not be capable of appearing or giving testimony in any forum in any jurisdiction.

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[4]They would, however, be subject to foreign subpoenas as defendants Brewer and Bishop pointed out at the argument.

[5]This argument lacks much strength inasmuch as counsel for Delta, at the hearing on March 21, 1977, on the record, offered to reimburse plaintiff for any out-of-pocket additional travel expenses incurred by reason of having the case tried in Atlanta.

Although it may be true that Delta derives substantial revenue from sales in the District of Columbia, as plaintiff has asserted, the Court does not find that fact provides sufficient nexus in this case for retaining the forum here. Finally, in looking at the relevant problem of Court congestion, it is clear that this case will come to trial more quickly before the proposed transferee court, and that the time involved in obtaining ultimate circuit court determinations, should the case be appealed, is less in the Fifth Circuit.[6]

The Court has carefully considered each of the remaining arguments advanced by plaintiff in opposition to the change of venue motions, both in his memorandum as well as at the hearing on the motions, and finds them to be without merit. In its discretion, the Court therefore concludes that the defendants have met their burden of establishing that this case should be transferred to the Northern District of Georgia, Atlanta Division. *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501 (1947).

The Court has likewise considered the Requests of plaintiff and Delta defendants for Attorneys' Fees and Costs incident to these Motions for Change of Venue, and finds them to be without merit.

Accordingly, upon consideration of the foregoing, the memorandum of points and authorities in support of and in opposition to the Motions for Change of Venue, including the exhibits attached thereto, the arguments of counsel and the entire record herein, and

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[6]The elapse time from initial lower court filing to final circuit court decision was 30.2 months in the District of Columbia and 20.8 months in the Fifth Circuit. *1975 Annual Report of the Director of the Administrative Office of the United States Courts,* at A-9.

the hearing requested by Delta defendants and plaintiff having been granted, it is by the Court this 31st day of March 1977,

ORDERED, that the Motions of Delta defendants and defendants Brewer and Bishop for a Change of Venue be, and the same hereby are, granted; and it is

FURTHER ORDERED, that the Requests of Delta defendants and plaintiff for Attorneys' Fees and Costs be, and the same hereby are, denied; and it is

FURTHER ORDERED, that the above-entitled case be, and the same hereby is, transferred to the Northern District of Georgia, Atlanta Division, pursuant to 28 U.S.C. § 1404(a).

/s/ Joseph C. Waddy
Joseph C. Waddy
United States District Judge

APPENDIX 2.

Order.

In the United States District Court, for the District of Columbia.

Frederick B. Pfister, Plaintiff, v. Delta Air Lines, Inc., et al., Defendants. Civil Action No. 76-1978 Reply Memorandum.

Filed: April 28, 1977.

Upon consideration of Plaintiff's Motion for Certification under 28 U.S.C. § 1292(b) and Defendants' Memorandum of Points and Authorities in Opposition thereto, and it appearing to the Court that the Order of this Court transferring this action to the Northern District of Georgia presents no "controlling issue of law as to which there is substantial ground for difference of opinion" and that an immediate appeal from said Order would not "materially advance the ultimate termination of the litigation" as required by 28 U.S.C. § 1292(b); the Court, this 28th day of April, 1977,

ORDERS that Plaintiff's Motion for Certification under 28 U.S.C. § 1292(b) be denied.

/s/ Joseph C. Waddy
HONORABLE JOSEPH C. WADDY
United States District Judge

APPENDIX 3.

Order.

United States Court of Appeals, for the District of Columbia Circuit.

No. 77-1371.

September Term, 1976.

In Re: Frederick B. Pfister, Petitioner. Civil Action 76-1978.

Before: Fahy, Senior Circuit Judge; McGowan, Circuit Judge

Filed: August 2, 1977.

On consideration of petitioner's petition for writ of mandamus, and of the motions for leave to file oppositions to the petition for writ of mandamus, it is

ORDERED by the Court that petitioner's petition for writ of mandamus is denied, and, it is

FURTHER ORDERED by the Court that the motions for leave to file oppositions are denied as moot.

Per Curiam

APPENDIX 4.

Order.

United States Court of Appeals, for the District of Columbia Circuit.

September Term, 1976.

No. 77-1371.

In Re Frederick B. Pfister, Petitioner. Civil Action 76-1978.

BEFORE: Bazelon, Chief Judge, Wright, McGowan, Tamm, Leventhal, Robinson, MacKinnon, Robb and Wilkey, Circuit Judges

Filed: September 13, 1977.

Petitioner's petition for rehearing *en banc* having been circulated to the full court, and no judge in regular active service having requested a vote thereon, it is

ORDERED by the Court, *en banc*, that petitioner's aforesaid suggestion is denied.

Per Curiam

For the Court:
George A. Fisher, Clerk
By: /s/ Robert A. Bonner
Robert A. Bonner
Chief Deputy Clerk

APPENDIX 5.

Order.

United States Court of Appeals, for the District of Columbia Circuit.

September Term, 1977.

No. 77-1371.

In Re: Frederick B. Pfister, Petitioner.

BEFORE: Fahy, Senior Circuit Judge; McGowan, Circuit Judge.

Filed: October 7, 1977.

Upon consideration of petitioner's motion for stay of mandate pending petition for certiorari, it is

ORDERED by the Court that petitioner's aforesaid motion is granted until further order of this Court.

Per Curiam

APPENDIX 6.

Order.

United States Court of Appeals, for the District of Columbia Circuit.

September Term, 1977.

No. 77-1371.

In Re: Frederick B. Pfister, Petitioner. Civil Action #76-1978.

BEFORE: Fahy, Senior Circuit Judge; McGowan and Wilkey, Circuit Judges.

Filed: October 31, 1977.

It is ORDERED by the Court, *sua sponte,* that the Clerk is directed to amend his records to reflect that Circuit Judge Wilkey cast his vote to deny petitioner's petition for writ of mandamus. It is

FURTHER ORDERED by the Court, *sua sponte,* that the Clerk is directed to amend his records on petitioner's petition for writ of mandamus by adding the following paragraph:

Senior Circuit Judge Fahy: Upon further consideration I am of the view that transfer of this case to the Northern District of Georgia Atlanta Division, would seriously endanger the ability of the plaintiff to carry forward there the litigation he has chosen to initiate in this jurisdiction. The inconvenience that defendants undoubtedly would bear in defending here does not appear to be of similar seriousness. For these reasons I think the order of the District Court to transfer the case was not within the sound discretion available to the Court. Accordingly I would grant the relief prayed by petitioner-plaintiff.

Per Curiam

APPENDIX 7.

Order.

United States Court of Appeals, for the District of Columbia Circuit.

September Term, 1977.

No. 77-1371.

In Re: Frederick B. Pfister, Petitioner.

Filed: Dec. 29, 1977.

BEFORE: Fahy, Senior Circuit Judge; McGowan and Wilkey, Circuit Judges.

Upon consideration of petitioner's motion for clarification of order, it is

ORDERED by the Court that the aforesaid motion is granted as follows:

The sole purpose of the order filed October 31, 1977 was to reflect a *sua sponte* change of vote by Senior Circuit Judge Fahy. Circuit Judge Wilkey's vote, as a member of the panel, was unnecessary to dispose of the matter at the time the order of August 2, 1977 was filed. Senior Circuit Judge Fahy's change of vote to grant and Circuit Judge McGowan's unchanged vote to deny created an equally divided Court; accordingly, Circuit Judge Wilkey's participation was called upon and his vote is reflected in the October 31, 1977 order.

Per Curiam

APPENDIX 8.

Order.

United States Court of Appeals, for the District of Columbia Circuit.

September Term, 1977.

No. 77-1371.

In Re: Frederick B. Pfister, Petitioner. Civil Action #76-1978.

BEFORE: Fahy, Senior Circuit Judge; McGowan and Wilkey, Circuit Judges.

Filed: Jan. 16, 1978.

On consideration of petitioner's motion for leave to consolidate causes before this Court, of petitioner's motion for leave enabling petitioner to introduce newly-acquired medical evidence in support of his petition for writ of mandamus and/or prohibition, or both, of petitioner's motion for further stay and retention of mandate pending application for petition of certiorari in the United States Supreme Court, and of the responses filed with respect thereto, it is

ORDERED by the Court that petitioner's motion to consolidate causes before this Court is denied, it is

FURTHER ORDERED by the Court that petitioner's motion for leave enabling petitioner to introduce newly-acquired medical evidence is denied, and, it is

FURTHER ORDERED by the Court that petitioner's motion for further stay and retention of mandate upon application for petition of certiorari is granted to and including January 30, 1978.

Per Curiam

APPENDIX 9.

Order.

United States Court of Appeals, for the District of Columbia Circuit.

September Term, 1976.

No. 77-1720.

Frederick B. Pfister, Appellant v. Delta Airlines, Inc., et al. Civil Action 76-1978.

BEFORE: Wright and MacKinnon, Circuit Judges.

Filed: Sept. 20, 1977.

This matter is before the Court on the motion to dismiss of appellees Delta Airlines, Inc., et al and Bishop and Brewer and appellant's opposition. On consideration of the foregoing, it is

ORDERED by the Court that the aforesaid motions are granted and this appeal is dismissed.

The Clerk is directed to transmit a certified copy of this order to the District Court as promptly as the business of his office permits.

PER CURIAM

APPENDIX 10.

Order.

United States Court of Appeals, for the District of Columbia Circuit.

September Term, 1977.

No. 77-1720.

Frederick B. Pfister, Appellant v. Delta Airlines, Inc., et al. Civil Action No. 76-1978.

BEFORE: Wright and MacKinnon, Circuit Judges.

Filed: Sept. 27, 1977.

Upon consideration of appellant's motion to stay or recall and retain mandate pending application of petition for certiorari in the United States Supreme Court, it is

ORDERED by the Court that the Clerk of the District Court is directed to return the certified copy of this Court's order filed September 20, 1977 as promptly as the business of his office permits, it is

FURTHER ORDERED by the Court that the Clerk is directed to stay reissuance of the mandate for a period of 30 days from the date of this order and, it is

FURTHER ORDERED by the Court that the Clerk is directed to retain the record on appeal herein pending disposition by the Supreme Court of the application for certiorari, subject to a request by the Supreme Court for its certification and transmittal.

Per Curiam

APPENDIX 11.

Order.

United States Court of Appeals, for the District of Columbia Circuit.

September Term, 1977.

No. 76-1720.

Frederick B. Pfister, Appellant v. Delta Airlines, Inc., et al. Civil Action 76-1978.

BEFORE: Wright and MacKinnon, Circuit Judges.

Filed: Nov. 2, 1977.

Upon consideration of appellant's motion for further stay and retention of mandate pending application for petition of certiorari in the United States Supreme Court, it is

ORDERED by the Court that the aforesaid motion is granted to and including December 15, 1977.

Per Curiam

For the Court:
GEORGE A. FISHER, Clerk
By: /s/ Daniel M. Cathey
Daniel M. Cathey
First Deputy Clerk

APPENDIX 12.

Order.

United States Court of Appeals, For the District of Columbia Circuit.

September Term, 1977.

No. 77-1720.

Frederick B. Pfister, Appellant v. Delta Airlines, Inc., et al. Civil Action #76-1978.

BEFORE: Wright and MacKinnon, Circuit Judges

Filed: January 4, 1978.

Upon consideration of appellant's motion for further stay and retention of mandate pending clarification of mandate and application for petitioner of certiorari in the United States Supreme Court if need be, of the opposition thereto, and it appearing that an order was filed December 29, 1977 in number 77-1371 on petitioner's motion for clarification, it is

ORDERED by the Court that appellant's motion is granted to and including January 30, 1978 subject to the provisions of Rule 41(b) of the Federal Rules of Appellate Procedure. No further stays of this Court's mandate will be granted by this Court.

Per Curiam

APPENDIX 13.

Order.

United States Court of Appeals, for the District of Columbia Circuit.

September Term, 1977.

No. 77-1720.

Frederick B. Pfister, Appellant v. Delta Airlines, Inc., et al. Civil Action #76-1978.

BEFORE: Wright and MacKinnon, Circuit Judges

Filed: January 10, 1978.

Upon consideration of appellant's motion for leave to consolidate causes, and of the responses thereto, it is

ORDERED by the Court that appellant's aforesaid motion is denied.

Per Curiam

APPENDIX 14.

Order.

United States Court of Appeals, for the District of Columbia Circuit.

September Term, 1977.

No. 77-1371.

In Re: Frederick v. Pfister, Petitioner. Civil Action 76-1978.

BEFORE: Fahy, Senior Circuit Judge; McGowan and Wilkey, Circuit Judges

Filed: November 11, 1977.

Upon consideration of petitioner's motion for further stay and retention of mandate pending application for petition of certioirari in the United States Supreme Court, it is

ORDERED by the Court that the aforesaid motion is granted to and including December 15, 1977.

Per Curiam

For the Court:
GEORGE A. FISHER, Clerk
By: /s/ Daniel M. Cathey
Daniel M. Cathey
First Deputy Clerk

APPENDIX 15.

29 U.S.C. 1001.

Title I—Protection of Employee Benefit Rights.

Subtitle A—General Provisions

Findings and Declaration of Policy

Sec. 2 (a) The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans is carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans

many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

(b) It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

(c) It is hereby further declared to be the policy of this Act to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.

APPENDIX 16.

29 U.S.C. 1002.

SEC. 3. For purposes of this title:

(1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan was established or maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 302(c) of the Labor Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide such pensions).

(2) The terms "employee pension benefit plan" and "pension plan" mean any plan, fund or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program—

(A) provides retirement income to employees, or

(B) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

(3) The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

(4) The term "employee organization" means any labor union or any organization of any kind, or any agency or employee representation committee, association, group, or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning an employee benefit plan, or other matters incidental to employment relationships; or any employees' beneficiary association organized for the purpose in whole or in part, of establishing such a plan.

(5) The term "employer" means any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.

(6) The term "employee" means any individual employed by an employer.

(7) The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

(8) The term "beneficiary" means a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder.

(9) The term "person" means an individual, partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, association, or employee organization.

(10) The term "State" includes any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, and the Canal Zone. The term "United States" when used in the geographic sense means the States and the Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act (43 U.S.C. 1331-1343).

(11) The term "commerce" means trade, traffic, commerce, transportation, or communication between any State and any place outside thereof.

(12) The term "industry or activity affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce, and includes any activity or industry "affecting commerce" within the meaning of the Labor Management Relations Act, 1947, or the Railway Labor Act.

(13) The term "Secretary" means the Secretary of Labor.

(14) The term "party in interest" means, as to an employee benefit plan—

(A) any fiduciary (including, but not limited to, any administrator, officer, trustee, or custodian), counsel, or employee of such employee benefit plan;

(B) a person providing services to such plan;

(C) an employer any of whose employees are covered by such plan;

(D) an employee organization any of whose members are covered by such plan;

(E) an owner, direct or indirect, of 50 percent or more of—

(i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of a corporation,

*(ii) the capital interest or the profits interest of a partnership, or * * *.*

APPENDIX 17.

29 U.S.C. 1104.

Fiduciary Duties.

Sec. 404. (a)(1) Subject to sections 403(c) and (d), 4042, and 4044, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title.

(2) In the case of an eligible individual account plan (as defined in section 407(d)(3)), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real

property or qualifying employer securities (as defined in section 407(d)(4) and (5)).

(b) Except as authorized by the Secretary by regulation, no fiduciary may maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the district courts of the United States.

(c) In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary)—

(1) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and

(2) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control.

APPENDIX 18.

29 U.S.C. 1132.

(e)(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

(2) Where an action under this title is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(f) The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

(h) A copy of the complaint in any action under this title by a participant, beneficiary, or fiduciary (other than an action brought by one or more participants or beneficiaries under subsection (a)(1)(B) which is solely for the purpose of recovering benefits due such participants under the terms of the plan) shall be served upon the Secretary and the Secretary of the Treasury by certified mail. Either Secretary shall have the right in his discretion to intervene in any action, except that the Secretary of the Treasury may not intervene in any action under part 4 of this

subtitle. If the Secretary brings an action under subsection (a) on behalf of a participant or beneficiary, Court for the District of Columbia.

(k) Suits by an administrator, fiduciary, participant, or beneficiary of an employee benefit plan to review a final order of the Secretary, to restrain the Secretary from taking any action contrary to the provisions of this Act, or to compel him to take action required under this title, may be brought in the district court of the United States for the district where the plan has its principal office, or in the United States District Court for the District of Columbia.

APPENDIX 19.

29 U.S.C. 1140.

Interference With Rights Protected Under the Act

Sec. 510. It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this title section 3001, or the Welfare and Pension Plans Disclosure Act, or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this title, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this Act or the Welfare and Pension Plans Disclosure Act. The provisions of section 502 shall be applicable in the enforcement of this section.

APPENDIX 20.

29 U.S.C. 1024(b)(1)(2)(3)(4).

(b) Publication of the summary plan descriptions and annual reports shall be made to participants and beneficiaries of the particular plan as follows:

(1) The administrator shall furnish to each participant, and each beneficiary receiving benefits under the plan, a copy of the summary, plan description, and all modifications and changes referred to in section 102(a)(1)—

(A) within 90 days after he becomes a participant, or (in the case of a beneficiary) within 90 days after he first receives benefits, or

(B) if later, within 120 days after the plan becomes subject to this part.

The administrator shall furnish to each participant, and each beneficiary receiving benefits under the plan, every fifth year after the plan becomes subject to this part an updated summary plan description described in section 102 which integrates all plan amendments made within such five-year period, except that in a case where no amendments have been made to a plan during such five-year period this sentence shall not apply. Notwithstanding the foregoing, the administrator shall furnish to each participant, and to each beneficiary receiving benefits under the plan, the summary plan description described in section 102 every tenth year after the plan becomes subject to this part. If there is a modification or change described in section 102(a)(1), a summary description of such modification or change shall be furnished not later than 210 days after the end of the plan year in which the change

is adopted to each participant, and to each beneficiary who is receiving benefits under the plan.

(2) The administrator shall make copies of the plan description and the latest annual report and the bargaining agreement, trust agreement, contract, or other instruments under which the plan was established or is operated available for examination by any plan participant or beneficiary in the principal office of the administrator and in such other places as may be necessary to make available all pertinent information to all participants (including such places as the Secretary may prescribe by regulations).

(3) Within 210 days after the close of the fiscal year of the plan, the administrator shall furnish to each participant, and to each beneficiary receiving benefits under the plan, a copy of the statements and schedules, for such fiscal year, described in subparagraphs (A) and (B) of section 103(b)(3) and such other material as is necessary to fairly summarize the latest annual report.

(4) The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary plan description, plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated. The administrator may make a reasonable charge to cover the cost of furnishing such complete copies. The Secretary may by regulation prescribe the maximum amount which will constitute a reasonable charge under the preceding sentence.

APPENDIX 21.

29 U.S.C. 1133.

Claims Procedure.

Sec. 503. In accordance with regulations of the Secretary, every employee benefit plan shall—

(1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and

(2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1068

FREDERICK B. PFISTER,
Petitioner,
v.
THE HONORABLE JUDGE JOSEPH C. WADDY,
and
DELTA AIR LINES, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

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MEMORANDUM FOR DELTA AIR LINES, INC., ET AL. IN OPPOSITION

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MEMORANDUM FOR DELTA AIR LINES, INC., ET AL.[1] IN OPPOSITION

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[1] This Memorandum in Opposition is submitted on behalf of the following Respondents herein (hereinafter collectively referred to as "Delta"): Delta Air Lines, Inc.; Delta Employee Benefit Plan, consisting of Delta Family Care, Disability and Survivorship Plan, Delta Air Lines, Inc. Group Insurance Plan, and Delta Family-Care Retirement Plan; Delta Admin-

Proceedings Below

The Petitioner herein, Frederick B. Pfister (hereinafter referred to as "Pfister") commenced his suit under the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001, *et seq.* (1974) ("ERISA") on October 26, 1976 in the District Court for the District of Columbia. On December 20, 1976, the more than twenty defendants moved, pursuant to 28 U.S.C. § 1404(a) (1962), to transfer Pfister's case to the District Court for the Northern District of Georgia, Atlanta Division. On March 31, 1977, Judge Waddy of the District Court for the District of Columbia granted defendants' motion and ordered that the case be transferred to Atlanta. In reaching that decision, Judge Waddy expressly considered the following facts: Pfister had worked for Delta in Virginia, is currently unemployed, now resides in Pennsylvania, and is suing over twenty defendants who reside in or around Atlanta, Georgia. The Judge additionally noted that the records relevant to Pfister's lawsuit are located in Atlanta, that Delta's corporate headquarters are in Atlanta, that most of the individual

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istrative Committee acting on behalf of Delta Family Care, Disability and Survivorship Plan, and Delta Family-Care Retirement Plan; W. T. Beebe, Individually; D. C. Garrett, Jr., Individually; R. Oppenlander, Individually; J. R. Howell, Individually; H. T. Fincher, Individually; R. W. Allen, Individually; R. S. Maurer, Individually; T. M. Miller, Individually; Wm. E. Stephens, Individually; Plan Administrator of Delta Family Care, Disability and Survivorship Plan, Delta Family-Care Retirement Plan, and Delta Employee Benefit Plan, Individually; John Aduddell; J. J. Schneider; and Donald Baus. The Respondents herein not represented on this Memorandum are Charles T. Bishop, Jr., and Brewer Adjustment Company.

defendants are senior corporate officers of Delta who are needed in Atlanta, and that a vast majority of the prospective witnesses live and work in the Atlanta area. Further, Judge Waddy reviewed the comparative court congestion in Atlanta and the District of Columbia and determined that Pfister's case could be more expeditiously concluded in the Atlanta forum. Judge Waddy also considered Pfister's two main arguments against transfer. In this regard, the Judge first observed that it would cost Pfister no more to try his case in Atlanta than in the District of Columbia because Delta had offered to reimburse him for any out-of-pocket additional expenses incurred because of an Atlanta-based trial. Second, in his response to Delta's motion to transfer venue, Pfister had alleged that he was so emotionally and physically ill that he could not travel; from this Judge Waddy properly concluded that Pfister could travel to the District of Columbia no better than to Atlanta. Accordingly, Judge Waddy determined that a transfer of the case to Atlanta was appropriate under 28 U.S.C. § 1404(a) for the convenience of parties and witnesses and in the interests of justice. Petitioner's Appendix 1, pp. 1-7 (hereinafter referred to as "Pet. App. ——, p. ——").

Pfister appealed that transfer order to the Court of Appeals for the District of Columbia. That appeal was dismissed on September 20, 1977 (Pet. App. 9, p. 15) on the ground that the order transferring venue was not an appealable order. On January 30, 1978, Pfister filed his present Petition for a Writ of Certiorari with this Court to review that dismissal.

Pfister also petitioned the District of Columbia Circuit for a writ of mandamus to reverse the dis-

trict court's transfer order on the grounds that Judge Waddy had abused his discretion in ordering a change of venue. That petition was dismissed by the court of appeals on August 2, 1977 (Pet. App. 3, p. 9). Pfister's subsequent request for a rehearing *en banc* was likewise denied on September 13, 1977 (Pet. App. 4, p. 10). On January 30, 1978, Pfister filed his present Petition for a Writ of Certiorari with this Court seeking review of the above appellate court order.[2]

Thus, in his combined Petition now pending before this Court Pfister urges this Court to review and reverse two appellate court determinations. First, Pfister asks this Court to rule that a district court order under 28 U.S.C. § 1404(a) transferring a case from one district court to another is an appealable order. Second, Pfister requests this Court to reverse the appellate court's order dismissing his petition for mandamus on the ground that Judge Waddy abused his discretion in ordering a transfer of this case to Atlanta.

For reasons summarized below, Delta submits that Pfister's combined Petition for a Writ of Certiorari herein should be denied in its entirety.

Reasons for Denying the Petition

1. *The Appeal.*—Pfister's appeal was dismissed by the court of appeals on September 20, 1977. Thus, his ninety days within which to file a petition for

[2] Pfister has filed a single Petition with this Court seeking reversal both of the appellate court's dismissal of his appeal and of its dismissal of his Petition for a Writ of Mandamus.

certiorari[3] expired on December 19, 1977.[4] The instant Petition to this Court, which was filed on January 30, 1978, is thus more than one month out of time and should be dismissed for lack of jurisdiction. *See Department of Banking* v. *Pink*, 317 U.S. 264 (1942).

Further, a transfer order by a district court is not an appealable order.[5] *E.g.*, *Pacific Car & Foundry* v. *Pence*, 403 F.2d 949 (9th Cir. 1968); *Wilkins* v. *Erickson*, 484 F.2d 969 (8th Cir. 1973). Pfister has advanced no arguments to support his request that this Court alter that clearly established doctrine.[6]

[3] 28 U.S.C. § 2101(c) (1949).

[4] The three stays of mandate granted by the court of appeals (Pet. Apps. 10, 11, 12, pp. 16, 17, 19) did not toll this 90-day period. *Title Guar. & Sur. Co.* v. *United States*, 222 U.S. 401 (1911). Nor did Pfister's attempt to consolidate his dismissed appeal with his dismissed mandamus petition, which was rejected by the court of appeals (Pet. App. 13, p. 19), toll the 90-day period, for that effort in no way affected the merits of Pfister's appeal nor sought to change the court of appeals' decision to dismiss. *Cf.*, *F.T.C.* v. *Minn.-Honeywell Reg. Co.*, 344 U.S. 206, 211 (1952).

[5] Pfister's motion for certification of the transfer decision for immediate appeal under 28 U.S.C. § 1292(b) was denied by Judge Waddy (Pet. App. 2, p. 8).

[6] Pfister urges this Court to determine that a district court order transferring a case is immediately appealable under the "collateral source rule" of *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1948). Petition, pp. 24-26. Significantly, Pfister cites no case supporting his position that the *Cohen* doctrine is applicable to transfer of venue orders. Pfister likewise points to no conflict among the various circuits with regard to the argument he advances. To the contrary, the circuits appear to agree that, absent extenuating

Indeed, this Court need not do so in order to protect Pfister or any plaintiff, for Delta has readily conceded throughout this litigation that Judge Waddy's order may be reviewed via a mandamus proceeding—but not an appeal—if Pfister can establish an abuse of discretion by Judge Waddy.

2. *The Mandamus Petition.*—Pfister's Petition for a Writ of Mandamus was dismissed by the court of appeals on August 2, 1977 and his subsequent request for a rehearing *en banc* was denied on September 13, 1977. Accordingly, Pfister's ninety days within which to file a petition for a writ of certiorari with respect to this order expired on December 12, 1977.[7] For this reason, Pfister's January 30, 1978 Peti-

circumstances not here present, orders transferring venue or refusing to transfer venue are interlocutory and not appealable under the "collateral source rule" articulated in *Cohen*. *See, e.g., Fischer* v. *First Nat'l Bank of Omaha,* 466 F.2d 511 (8th Cir. 1972); 9 *Moore's Federal Practice* ¶ 110.13[6] at 174. Indeed, the thrust of Pfister's contentions merely supports the conclusion that a petition for writ of mandamus—not an appeal—is the appropriate procedural vehicle for obtaining appellate court review of a district court transfer order. *See, e.g., Pacific Car & Foundry* v. *Pence, supra; Wiren* v. *Laws,* 194 F.2d 873 (D.C. Cir. 1951).

[7] The three stays of mandate granted by the court of appeals (Pet. Apps. 5, 8, 14, pp. 11, 14, 20) did not toll this 90-day period. *Title Guar. & Sur. Co.* v. *United States, supra* note 4. Nor did Pfister's attempt to consolidate his dismissed mandamus petition with his dismissed appeal toll the 90-day period. Pet. App. 8, p. 14. *Cf., F.T.C.* v. *Minn.-Honeywell Reg. Co., supra* note 4, at 211. Further, neither the court of appeals' *sua sponte* order of October 31, 1977 setting forth Judge Fahy's dissenting opinion (Pet. App. 6, p. 12) nor its December 29, 1977 order clarifying the October 31 order as nothing more than a reflection of Judge Waddy's dissent (Pet. App. 7,

tion, which is more than one and one-half months out of time, should be dismissed for lack of jurisdiction. *See Department of Banking* v. *Pink, supra.*

Moreover, notwithstanding the above, it is clear that the appellate court properly declined to grant Pfister's mandamus petition, as the district court did not abuse its discretion in ordering a transfer of venue.[8] Thus, the district court carefully weighed all

p. 13) tolled the 90-day period, for neither order changed any matters of substance, resolved any real ambiguity, or "disturbed or revised any legal rights and obligations . . . ." *F.T.C.* v. *Minn.-Honeywell Reg. Co., supra* note 4, at 211. Pfister's frivolous and futile attempt to introduce newly acquired evidence to the court of appeals after his mandamus petition had been dismissed (Pet. App. 8, p. 14) did not toll the 90-day period. For, like the above discussed motions, it sought no change in the substance of the court of appeals' order dismissing the mandamus petition. *Cf. F.T.C.* v. *Minn.-Honeywell Reg. Co., supra* note 4, at 211; *Department of Banking* v. *Pink, supra.*

[8] In substantial part, Pfister's Petition deals with the alleged merits of his lawsuit against Delta and is irrelevant to the question of whether or not this case should be tried in Washington, D.C. or Atlanta, Georgia. Moreover, to the extent Pfister's arguments concerning his ill health and lack of funds are relevant to the issue at hand, the district court clearly considered these factors and thus did not abuse its discretion by ordering a transfer of venue. Thus, for example, the district court properly noted Pfister's lack of funds and stated (at Pet. App. 1, p. 5 n.5):

> "This argument lacks much strength inasmuch as counsel for Delta, at the hearing on March 21, 1977, on the record, offered to reimburse plaintiff [Pfister] for any out-of-pocket additional travel expenses incurred by reason of having the case tried in Atlanta."

relevant factors and concluded that the convenience of the parties, the convenience of witnesses and the interests of justice would be best served by a transfer of the case from the District of Columbia to Atlanta, Georgia (Pet. App. 1, pp. 1-7). *See generally Loew's Inc.* v. *McGuire*, 205 F.2d 719 (D.C. Cir. 1953).

Pfister seems to contend, however, that because ERISA was enacted to protect employees like him, district courts may not transfer ERISA cases. Significantly, Pfister cites no legislative history or statutory language indicating that Congress intended to modify the provisions of 28 U.S.C. § 1404(a) by its enactment of ERISA. Accordingly, Pfister has given this Court no reason to deviate from the clear rule that all civil actions are subject to transfer under 28 U.S.C. § 1404(a) if the convenience of parties and witnesses and the interests of justice will be better served by such a transfer. *Ex Parte Collett*, 337 U.S. 55 (1949); *United States* v. *National City Lines, Inc.*, 337 U.S. 79 (1949); 1 *Moore's Federal Practice* ¶ 0.145[4.-1].

Pfister also seems to advance a "fall back" argument to the effect that ERISA creates a presumption in favor of a plaintiff's forum selection so that even if a district court may consider a transfer under 28 U.S.C. § 1404(a), it may order transfer only if it is

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Further, as to Pfister's ill health, the district court stated (at Pet. App. 1, p. 5):

> "Moreover, if the plaintiff [Pfister] is as emotionally and physically permanently injured as it is alleged, the Court must assume that he would not be capable of appearing or giving testimony in any forum in any jurisdiction."

clear that the interests of justice and convenience of the parties and witnesses will be better served by a change of venue. Again this argument disregards the teachings of *Ex Parte Collett, supra.* Further, this argument merely restates Pfister's contention that Judge Waddy abused his discretion by transferring this case to Atlanta. However, as Delta has shown above, and as a reading of the district court's decision makes clear, there has been no abuse of discretion.

Thus, despite Pfister's protracted lament, he clearly has forfeited no substantive rights by the transfer of his case to Atlanta. He may continue to pursue fully his claims, for none have been dismissed. The appellate and district courts have done no more than tell Pfister that ERISA plaintiffs may not engage in unseemly forum shopping and that the convenience of witnesses and parties, as well as the interests of justice, will be better served if he, a Pennsylvania resident, who worked in Virginia and has sued over twenty defendants residing in and around Atlanta, proceeds with his case in Atlanta rather than in the District of Columbia. Notwithstanding Pfister's contentions to the contrary, no extraordinary precedent injurious to future ERISA plaintiffs has been established by the decisions below. Nor does this case present any new principle of law worthy of review by this Court.

Conclusion

Pfister's Petition for a Writ of Certiorari has been untimely filed and is substantively unworthy of review. Accordingly, it should be denied.

Respectfully submitted,

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Dated: February 28, 1978